MOTION FILED

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No. 04-1021

In the
Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND PROPOSED BRIEF OF *AMICUS CURIAE* MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION IN SUPPORT OF PETITIONER

ALLEN S. BUSH
Counsel of Record
ALLEN S. BUSH, P.C.
2607 EAST CROWN DRIVE
TRAVERSE CITY, MI 49684
(231) 929-7620
Counsel for Amicus Curiae Michigan Interscholastic Athletic Administrators Association

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MICHIGAN INTERSCHOLASTIC ATHLETIC ADMINISTRATORS ASSOCIATION

The Michigan Interscholastic Athletic Administrators Association (MIAAA) by its attorney, Allen S. Bush, hereby moves for leave to file a brief amicus curiae in the above captioned matter for the following reasons:

1. The MIAAA is a not-for-profit Michigan Corporation composed of 733 individuals who are, or were, practicing athletic administrators in the State of Michigan.

2. The MIAAA believes that it has information and insights, which relate directly to the issues of the appeal at hand.

3. Any remedy and determination will have a vital impact on the manner in which the members of the MIAAA may practice their profession in the State of Michigan in that a change in the sports seasons and the scheduling of athletic contests will directly affect the individual administrators in their day-to-day operation and employment and in their efforts to promote and to provide quality athletic opportunities for all students in their respective school districts.

4. The MIAAA applied for and was granted amicus curiae status in the U.S. District Court and the Court of Appeals for the Sixth Circuit in their deliberations on the matter below.

THEREFORE, this Amicus Curiae Petitioner requests that this Court grant its Motion for Leave to file a Brief Amicus Curiae and that the Court accept the attached Proposed Brief

Amicus Curiae in support of the positions of the Michigan High School Athletic Association's Petition for Certiorari.

Allen S. Bush
Allen S. Bush, P.C.
Attorney for Amicus Curiae
Michigan Interscholastic Athletic
Administrators Association

INTEREST OF THE AMICUS

The Michigan Interscholastic Athletic Administrators Association (MIAAA) is a Michigan not-for-profit corporation composed of more than 700 members, who are athletic administrators in the public and private schools of Michigan. The members of the MIAAA are generally charged with the day-to-day administration of the athletic programs of their respective schools. They are in charge of scheduling contests and facilities, hiring and evaluating coaches and workers, and insuring compliance with all of the rules and regulations of their school district, their leagues, and the Michigan High School Athletic Association as the rules would pertain to the entire interscholastic athletic program. Because of the profound effect of the lower Court's rulings upon the day-to-day activities of the members and the programs they administer, the MIAAA is filing this brief in support of the Petitioner. The parties were asked to consent to the filing of this brief; Petitioners consented, but the Respondents declined.[1]

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit should be summarily reversed. The Sixth Circuit has created an administrative nightmare for the members of this Association in that the Court has affirmed the erroneous decision of the U.S. District Court for the Western District Of Michigan by emphasizing

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[1] Counsel for the parties of this case did not author this brief in whole or in part. No person or entity, other than the amicus curiae, MIAAA, its members, and its counsel, made a monetary contribution to the preparation and submission of the brief.

that any differences between boys' and girls' athletic programs, no matter how slight, are presumptively unconstitutional. Instead of individuals complaining to the Office of Civil Rights under Title IX, 20 USC 1681-1688, those same individuals can now file a federal lawsuit seeking to have any decision they oppose declared unconstitutional with the burden of proof falling upon the school to show an exceedingly persuasive reason for the decision. The administration of single-gender athletic teams, a concept encouraged under Title IX to maximize the participation opportunities of females in interscholastic sports, will become too costly and too unwieldy for any Michigan school district to operate. If the average school district in Michigan is confronted with multiple constitutional challenges to the operation of its single-sex athletic teams, it will stop having single-sex teams to save the costs of the litigation and revert to one team per sport. The net effect will be to reduce the participation opportunities for all children in the State of Michigan. Thirty years of steady increases in athletic opportunities for young people will be erased and a valuable educational experience will be denied to a large number of children.

ARGUMENT

Before the instant litigation began, the sports seasons for boys' and girls' athletics were set by the local school districts of the State of Michigan through elected representatives to the Michigan High School Athletic Association. From time to time, over the years, the seasons for some of the sports were changed to accommodate the desires of the majority of the districts. The most important concerns have always been the climate, facilities, and other resources that were necessary for the programs to succeed. In point of fact, not all of the schools in the state had the same seasons for all of the same

sports due principally to the weather and facility limitations of Michigan's more northern and rural Upper Peninsula.

The U.S. District Court for the Western District of Michigan reached a novel determination that there were traditional and non-traditional seasons for every sport, and that boys' and girls' teams should be equally disadvantaged in the scheduling of their high school sports' seasons. The Court ignored undisputed proof, which showed that Michigan's female athletic participation was greater than that of states with a greater overall population but which held "traditional" seasons for girls' athletics. The irony here is that the Michigan high schools had continuously created more opportunities for females under the guidance of the Office of Civil Rights and the statistics proved they were succeeding.

The Sixth Circuit did not balance the Title IX concerns for increased opportunities against the loss of those opportunities which have inevitably followed the change to the new "traditional" seasons. (In a recent report from the National Federation of High School Athletic Associations, North Dakota reported a 10.6% drop in girls' basketball participation and a 7% drop in volleyball participation; South Dakota, within two years of the change, dropped 13.1% in girls' basketball; Montana, within two years of the change, dropped 10.9% in girls' basketball and 8.1%in girls' volleyball; and in West Virginia, since the change was made in 1985-86, the number of girls and boys playing high school basketball has dropped 19.4% and 27.4%, respectively.).[2] Instead, the Court focused on the application of intermediate scrutiny requiring the MHSAA to show an exceedingly

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[2] Memorandum to Representative Counsel. Jack Roberts, Executive Director. November, 5, 2004.

persuasive reason that the seasons should not be changed, and in so doing made every issue of dissimilarity between a boys' program and a girls' program a constitutional concern. If that standard is the legal guide for the administration of athletic programs then it will lead to the abolition of separate-gender athletic teams.

As the athletic directors of the state began to regroup after the disappointing result from the Sixth Circuit, they became aware of the many issues that have been created by the decision. Aside from just selecting the date, time, and location of contests for boys' and girls' teams, they have to consider every detail of the athletic programs. Even assuming the uniforms and practice equipment can be purchased uniformly for all teams regardless of gender, the most likely areas of dissimilarity will occur with the issues which have been the most difficult to resolve under Title IX. These areas are the quality and availability of coaches and game personnel, the use of limited facilities, publicity, fundraising, and off-season activities.

Many small and rural school districts have used the same coaching staff for boys' and girls' teams. With the seasons being changed to run simultaneously, it is unlikely the staff can operate both programs. The selection and hiring of quality coaches, officials and game workers appears to have become a constitutional question if some individual takes issue with whether the two programs were equally disadvantaged by the quality of the hirings related to their individual sport.

In the smaller high schools in the State of Michigan, it is rare to have access to more than one full-sized gymnasium. The scheduling of practice times and locations for various team levels (each basketball program customarily has three teams: a varsity, a junior varsity, and a freshmen team, per

gender), whether in the high school or at smaller elementary gyms, would need to be precisely the same. It is impossible to replicate the precise practice times for each of the teams in the same facility. This would include auxiliary activities such as Saturday and Sunday open gyms, weight training, or water training activities, and all of the scouting functions of video player access and medical training rooms. It will be impossible to replicate the precise times of the day for each similarly situated team to utilize the limited facilities for an exclusive team activity. There is simply no exceedingly persuasive argument for having the girls' varsity start practice at 3 p.m. and the boys' start at 4 p.m. other than someone needs to go first.

One special facilities problem for older or smaller schools with one varsity locker room is the use of that space. Any school constructed before 1980 does not have a varsity locker room that accommodates females. If the choice is to reconstruct the building or have a single basketball team, the likely choice is the latter.

Publicity has been an area of concern for the Office of Civil Rights under Title IX for many years. The concept is not only the amount of media coverage but the equal promotion of all of the teams. This concept includes the use of pep bands, cheerleaders, pep assemblies, and any other facet that contributes to the experience of the evening such as concession stands, meet- the-team nights, parents' nights, and booster organizations. It is difficult for this author to conceive that having or not having a concession stand at a high school basketball game is a presumptive violation of the United States Constitution.

Fundraising for high school sports has become a major problem for athletic administrators. The school districts have

not increased athletic budgets to match the huge growth in athletic programs, which is due, in large part, to the ever-growing interest of girls in athletics. It is most common for the schools to encourage the formation of booster clubs to provide supplemental funds for the programs. If the clubs are sport specific, their success tends to mirror the traditionally successful programs. If the club is a universal club, it supports all of the sports teams and is usually administered by the athletic director who allocates the funds to the teams. In either case, the athletic administrator cannot operate the programs without the booster funds, but it is likewise impossible to assure that each of the teams will receive precisely the same dollar amounts under either system. Whatever decision-making criteria are applied to the distribution of funds they will not be exceedingly persuasive if they are not exactly the same.

The parade of potential discrepancies between the various male and female programs is endless. The athletic administrators are currently challenged to meet the 'essentially equivalent' standards applied by the Office of Civil Rights for Title IX compliance. In trying to balance the individual preferences of coaches, competing schools, the availability of scarce facilities, talented workers and game officials, the need to be exceedingly persuasive for all of the decisions that are made makes the separation of teams an impossible burden. The schools will always look for the simplest and cheapest method to resolve their problems. In the instant case, to avoid endless litigation over trivial distinctions, the schools will either abandon athletics all together (an idea that would be politically unpopular) or resort to athletic teams open to all genders, thus, reversing thirty years of gender equity progress.

Athletic directors are committed to the educational value of athletic experiences for the young people of their schools. They value the lessons to be learned by every child and they are moved to participate in this process by the knowledge that the rulings of the lower Courts will destroy opportunities for the children of the State of Michigan. Every state in this union recognizes the phrase 'in the best interest of the child' as a guidepost for the legal rights of children. However, the findings in the Courts below are not in the best interests of the children of the State of Michigan.

CONCLUSION

The Court should reverse the decisions below.

Allen S. Bush
Allen S. Bush P.C.
Attorney for Amicus Curiae
Michigan Interscholastic Athletic
Administrators Association